

**STATEMENT OF SENATOR JOHN McCAIN  
CHAIRMAN, SENATE COMMITTEE ON  
COMMERCE, SCIENCE, AND TRANSPORTATION  
COMMUNICATIONS SUBCOMMITTEE HEARING  
ON FCC IMPLEMENTATION OF SECTION 271  
MARCH 25, 1998**

Good afternoon. I would like to thank all of our witnesses for appearing today, and I commend Senator Burns for convening this hearing on an issue of tremendous importance to consumers.

Section 271 is a very arcane area of the 1996 Telecom Act, but it's also a very important one. Responsible administration of its fourteen-point "checklist" is among the most important jobs Congress has given the FCC to do. The Commission's success, or failure, will play a major role in determining whether consumers enjoy lower prices and more choices in local and long-distance service. But, as is unfortunately the case with many other aspects of the 1996 Telecom Act, the FCC's implementation of the competitive checklist has been the subject of considerable criticism.

I need hardly remind anyone here that I did not vote for the 1996 Telecom Act. One of the many, many reasons I didn't was precisely because I thought that the apparently straightforward checklist process had all the hallmarks of a becoming a real regulatory nightmare. And a regulatory nightmare is exactly what it became for virtually everyone involved -- the local telephone companies, those who truly want to compete with them, and the FCC.

The problem with Section 271 is the same problem we see over and over again in the provisions of the 1996 Telecom Act. Congress intended to write a procompetitive, deregulatory law -- but didn't. Because the Telecom Act's proponents didn't understand the realities of the telecom market and the incentives of the multibillion-dollar corporations in it, a law that seemed simple and spare when Congress wrote it became impossibly complicated and overregulatory when the FCC implemented it.

Some of this, to be sure, is the fault of the FCC and its curious law of bureaucratic physics -- that is, in order to prevent any conceivable marketplace action, there must be a perfect and opposite regulatory *over-reaction*. Congress may not have intended the federal micromanaging and stalemating that Section 271 has produced; but if not, what Congress *intended* wasn't what Congress *wrote*.

The vast difference between what the fourteen-point checklist says the FCC should do, and what it allows the FCC to do, is evident from the testimony of two of the new FCC Commissioners. Commissioner Furchgott-Roth emphasizes that the Commission must apply the terms of the competitive checklist strictly as they are written, because, as he very correctly observes, "The FCC does not write laws." Yet Commissioner Tristani is

equally correct when she observes that the FCC's Local Competition Order "contains hundreds of pages of binding law on the meaning of 11 of the 14 checklist items...[and] while no 271 Order has addressed the meaning of unbundled loops, the Local Competition Order contains no less than 20 paragraphs discussing what it means to provide unbundled local loops."

Many of us in Congress, including myself, are severely troubled by the extent of detail in which the FCC has immersed itself in administering the fourteen-point checklist, believing that, as Commissioner Powell says in his testimony, the search for the perfect becomes the enemy of the good. Nevertheless, the inescapable if uncomfortable reality is that, as presently written, Section 271 permits an incredible degree of FCC micromanagement.

Having chosen to interpret a large number of detailed requirements into the fourteen-point checklist, the FCC must now do more if it does indeed want somehow to "get to 'yes'" in a Section 271 application.

First, it must explain publicly, promptly, and precisely, what applicants must do to meet *each* of the requirements that have been grafted onto the checklist. It's a tough assignment, but, having opted to interpret these requirements into the checklist, the Commission cannot shirk its responsibility to say exactly what they mean. Fundamental fairness demands no less, and Chairman Kennard's testimony shows why. He states that issues involving operations support systems run through ten of the fourteen checklist requirements -- and yet the question of what specific levels of performance are required for many of these elements of operations support systems has yet to be answered.

Second, it is absolutely imperative that the Commission prioritize which of its dozens and dozens of compliance prerequisites are the most important, and that it realistically calibrate its approval process accordingly. It is simply not likely, nor is it necessary, for applicants to demonstrate letter-perfect, up-front compliance with each and every one of the many new FCC prerequisites before a Section 271 application can be granted.

In his testimony Chairman Kennard appears to criticize this approach, arguing that it's tantamount to requiring compliance with fewer than all of the fourteen checklist items. With all due respect, that argument misses the fact that the Commission has vastly expanded the fourteen-point statutory checklist to include a plethora of new subelements. Having done so, the Commission must now separate the major subelements from the minor subelements, require upfront compliance with the most critical, and grant conditional approval subject to performance benchmarks and stringent enforcement for the less critical.

Implementation of the new collaborative process proposed by Commissioner Powell has been a marked change for the better; it's apparently facilitating an information

exchange that has hitherto been lacking. But I would caution the Commission that this process must produce more than just dialogue -- it must produce results. This Committee will watch the Commission's progress to make sure that its preoccupation with uncovering seemingly endless compliance requirements doesn't cause the collaborative process to lapse into a way to continue debating checklist questions instead of answering them.

This brings me to Chairman Kennard's lengthy letter last week, responding to a request from Senator Brownback and myself that he state what constitutes compliance with each of the checklist elements. The letter is a recap of the Commission's opinions and an indication of how the staff would evaluate compliance with each of the many requirements that the Commission hasn't yet addressed. Nevertheless, a number of major questions, although identified, remain unanswered, and the lack of definitiveness surrounding many of the Commission-imposed requirements this late in the game is disconcerting.

I can, and do, appreciate the staff efforts that have gone into implementing Section 271 thus far -- at the same time that I can, and do, hold the Commission's leadership responsible for not having advanced the process beyond the point at which it is today. *Raising* issues isn't the same as *resolving* issues. The public deserves more progress than the Commission has made, and more clarity and certainty than the Commission has given. I commend the Commission's ongoing efforts to improve the Section 271 process, and I encourage you to go even further.

Mr. Chairman, while I am unfortunately not able to remain for the entire hearing, I will review the record and I will submit a list of questions to the FCC for a written response.

.